on foot or in a privately controlled vehicle, not a common carrier engaged in interstate commerce, his act would not constitute interstate commerce and he would not be subject to the control of congress. The act easily bears the construction that it is not intended to apply to such transportation."

CLARKE v. CLARKE et al.

June 12, 1919.

[99 S. E. 664.]

1. **Partnership (§ 80*)—Failure to Keep Accounts—Dispute—Presumption.**—Each partner is bound to keep correct account of his transactions, and a partner failing to do so will be held to the strictest account, and every reasonable presumption will be made against him, and on a dispute as to partnership matters, where one or both partners have lost evidence thereon, the court will not assume to adjust relative rights, where proof is entirely deficient and inconclusive.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 841]

2. **Payment (§ 67 (1)*)—Evidence—Check.**—Without evidence to the contrary, the Virginia rule is that a check, standing alone, implies that it is given in payment of a debt previously existing or created at the time check is drawn.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 10.]

3. **Witnesses (§ 15º (12)*)—Transactions with Decedent—Deposition.**—In suit to enjoin prosecution of actions at law against a partner, where report of commissioner to settle accounts was recommitted after death of complainant, a deposition then taken of a defendant as to partnership transactions with deceased should have been excluded.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 943.]

Appeal from Circuit Court, Culpeper County.

Suit in equity by John H. Clarke against R. Taylor Clarke and others to enjoin the prosecution of actions at law. Injunction ordered, and cause referred to a commissioner to settle accounts, and exceptions by complainant, and, after his death, by Gertrude Clarke, his administratrix, to commissioner's report, sustained, and cause recommitted to commissioner, and decree for defendants, and complainant appeals. Affirmed.

Hiden & Bickers, of Culpeper, for appellant.

Grimsley & Miller and *E. E. Johnson,* all of Culpeper, for appellees.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

PRENTIS, J. John H. Clarke instituted his suit in equity to enjoin the prosecution of two actions at law against him, one brought by the Clarke Hardware Company for the benefit of R. Taylor Clarke, its assignee, and the other by W. D. Clarke & Bro. The allegations of the bill are indefinite, but, among other things, it avers that John H. Clarke and his brother, R. Taylor Clarke, were partners engaged in the manufacture and sale of brick under the name and style of Culpeper Brick Company; that on September 1, 1912, R. Taylor Clarke retired from the partnership, and John H. Clarke assumed the debts and took the assets of the firm. There was a written contract, which has been lost. John H. Clarke having failed to pay these debts, the actions at law above referred to were instituted. The bill also alleges that John H. Clarke was more particularly engaged in looking after the actual management of the concern, while R. Taylor Clarke "handled almost exclusively the financial management of the business;" that he, the complainant, believed that appellee was indebted to the Culpeper Brick Company in a large sum, but that the books, papers, and vouchers had been so carelessly and negligently kept by the appellee that it was impossible for him (John H. Clarke) to ascertain the amount of debts due by R. Taylor Clarke and W. D. Clarke & Bro. to the Culpeper Brick Company. The injunction was awarded, and the causes referred to a commissioner to settle the accounts. The commissioner reported the sums withdrawn by the two partners, and it appeared that John H. Clarke had withdrawn more than R. Taylor Clarke, but that he was unable, because of the condition of the books, to ascertain the state of the accounts between the parties.

This report was excepted to by John H. Clarke, and after his death by his administratrix. The exceptions were sustained, and the cause recommitted to the commissioner "to allow the complainant further time to produce evidence before the said commissioner to sustain the matters claimed by her in this said cause, and to restate and reform the said report in accordance with whatever evidence, if any, that may be produced before him by the next term of court." The commissioner again reported his inability to ascertain from the books or otherwise the true state of the account between the parties. He reported, however, that the amount due by the Culpeper Brick Company to the Clarke Hardware Company was as claimed in the action at law, and that the debt claimed by W. D. Clarke & Bro. was entitled to a certain credit.

This result is, of course, not surprising, because John H. Clarke lived from September 1, 1912, the date on which the part-

nership was dissolved, until a date between April 24, 1916, and December 19, 1916, and he, during that period of 3½ years, according to the record, was never able to indicate with any certainty anything except his belief that R. Taylor Clarke owed the Culpeper Brick Company some indefinite amount of money. All the books, papers, and available evidence were indicated to the learned counsel who represented him, and he, as he testifies, was never able to ascertain from the books and papers or otherwise just how the accounts stood between the parties.

[1] In Ryman *v.* Ryman, 100 Va. 20, 40 S. E. 96, this is stated:

"It is the duty of each partner to keep a correct account of his transactions. Where a partner fails in this regard, he will be held to the strictest account, and every reasonable presumption will be made against him. Where there is a dispute in regard to partnership matters, and either party or both parties have been so negligent as to lose the evidence of the partnership, and to keep their accounts in such a confused way that the court cannot see what decree would do justice between the parties, the court will be unable to make a decree at all, and will dismiss the bill. Bates on Partnership, §§ 313, 909; 2 Lindley on Partnership, 809; 1 Barton's Ch. Pr. § 29; Foster's Curator *v.* Rison, 17 Gratt. [58 Va.] 321; Rick *v.* Neitzy, 1 Mackey [12 D. C.] 21; Hall *v.* Clagett, 48 Md. 223. In the case last cited it is said that, if there has been a total failure to keep accounts, it affords a good reason for a court of equity to decline to supply them, without a sufficient reason or excuse for the omission. A court of equity will not grope its way in utter darkness and undertake to create and establish a claim upon mere contingencies, or the preponderance of mere possibilities or probabilities. There is no duty devolving on it to assume the impracticable task of adjusting the relative rights of partners when the proof is utterly deficient and inconclusive."

Slaughter *v.* Danner, 102 Va. 270, 46 S. E. 289, announces the same doctrine.

In Lewelling *v.* Lewelling, 110 Va. 761, 67 S. E. 362, the authorities are collected, and this is quoted from Slater, Myers & Co. *v.* Arnett, 81 Va. 432:

"As the partnership transactions cannot be settled upon any basis at all rational now, the books being so badly kept as to be worthless, and there being no evidence produced by either side upon which the court could proceed towards any rearrangement of the affairs, what can be done except to leave them as the brothers did when both were living and arranging their business between themselves."

[2] It is claimed, because certain checks of the Culpeper

Brick Company have been found which do not appear upon the books, that therefore these must be charged against R. Taylor Clarke. In the absence of evidence to the contrary, the rule in this state is that a check, standing alone, implies that it is given in payment of a debt previously existing or created at the time of the drawing of the check. Terry *v.* Ragsdale, 33 Gratt. (74 Va.) 342; McVeigh *v.* Chamberlain, 94 Va. 77, 26 S. E. 395.

[3] When the report was recommitted to the commissioner, after the death of John H. Clarke, the commissioner took the deposition of R. Taylor Clarke as to the partnership transactions. The appellant objected to the introduction of this testimony, upon the ground that John H. Clarke, the other party to the transactions, was dead. This exception should have been sustained. It is proper to say that this testimony shows, if true, that R. Taylor Clarke is not indebted to the appellant. With this testimony excluded, as it must be under the existing Virginia statutes, the complainant is as much without evidence to sustain his claim as he was when he alleged in his bill that—

"Because of the hopeless tangle in which the affairs of this company have been gotten, he has been unable to arrive at any correct or satisfactory statement, or to ascertain what is the amount due by the said R. Taylor Clarke and the said W. D. Clarke & Bro. to the said Culpeper Brick Company, or to your complainant as the successor of the same."

The commissioner, the trial court, and this court are equally unable to ascertain the existence of any such indebtedness, and therefore the decree will be affirmed.

Affirmed.